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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN SALAZAR,

Defendant and Appellant.

2d Crim. No. B291149
(Super. Ct. Nos. 18F-02257
& 17F-10063-C)
(San Luis Obispo County)

John Salazar appeals the judgment after plea of no contest to felony vandalism causing over \$400 in damages (Pen. Code,¹ § 594, subds. (a) & (b)(1)) and his admission of a violation of his probation in another case. The trial court placed him on mandatory supervision. Salazar contends the court erred when it imposed a stay-away order under section 136.2. For the first time on appeal, he also challenges the imposition of conditions of his mandatory supervision authorizing the search of his mobile

¹ All statutory references are to the Penal Code unless otherwise stated.

electronic devices and barring him from possessing alcohol, frequenting establishments where the sale of alcohol is the principal business, and possessing drug paraphernalia. We strike the stay-away order and otherwise affirm.

FACTS AND PROCEDURAL HISTORY

On March 8, 2018, Salazar was charged in case no. 18F-02257 with felony vandalism causing more than \$400 in damage, resisting an executive officer (§ 69), and resisting, obstructing or delaying a peace officer (§ 148, subd. (a)(1)). The probation report² states: “On 03/06/18, at approximately 2129 hours, victim David Honzell reported that [Salazar] had verbally abused him and then Salazar poured transmission fluid on his vehicle. Salazar also threatened to set Honzell’s car on fire. Salazar was contacted and displayed signs and symptoms of being under the influence of alcohol. Subsequently, he was arrested and later transported to county jail. During transport to county jail, Salazar threatened the officers’ lives.”

Salazar pled no contest to the vandalism charge and the remaining charges were dismissed. He also admitted that in committing the vandalism he violated his probation in case no. 17F-10063-C, in which he was convicted of forgery (§ 476).

The trial court imposed a split sentence³ of two years and placed Salazar on mandatory supervision with conditions.

² Because there was no preliminary hearing, the relevant facts are derived from the probation report.

³ “A split sentence is a hybrid sentence in which a trial court suspends execution of a portion of the term and releases the defendant into the community under the mandatory supervision

The court revoked Salazar’s probation in case no. 17F-10063-C, imposed a two-year county jail sentence, and ordered the sentence to run concurrently. Over Salazar’s objection, the court also imposed a stay-away order as to Honzell pursuant to section 136.2.

DISCUSSION

Stay-away Order (§ 136.2)

Salazar contends the trial court erred in imposing a stay-away order under section 136.2. We agree.

In placing Salazar on mandatory supervision, the court imposed a condition (condition 24) requiring that Salazar “[n]ot have any direct or indirect contact with the victim [Honzell].” After Salazar was sentenced, the prosecutor asked the court to also impose a stay-away order pursuant to section 136.2. Defense counsel objected and argued: “[I]f the court is going to [issue] a [section] 136.2 order subsequent to a determination of guilt by a plea or trial, it’s limited to cases . . . that are all listed in the statute. [¶] This is nothing more than a vandalism charge, and it is not the basis for a post-plea order. [Section] 136.2 provides very limited provisions for subsequent order, and this is not one of them.”

The court overruled counsel’s objection and issued a stay-away order under section 136.2. The court ordered Salazar “to have no personal, electronic, telephonic, or written contact with [Honzell]. You are to have no contact with him through a third party except an attorney of record. You may not come within 50 yards of him, and he is permitted to record any prohibited communications made by you. You will receive a copy

of the county probation department.” (*People v. Camp* (2015) 233 Cal.App.4th 461, 464, fn. 1.)

of this order this morning. Make sure that you abide by the terms.”⁴

The court had no authority to issue a stay-away order under section 136.2. That section provides in pertinent part that “[u]pon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur,” the court may order “that a person . . . shall have no communication whatsoever with . . . a victim.” (§ 136.2, subd. (a)(1)(D).) Except in domestic violence cases (which this is not), it is error to issue such an order where “there was no basis for a good cause belief [the defendant] had attempted either during or after the commission of the [offense] to intimidate or dissuade his victims . . . from reporting the crimes or testifying against him and no evidence of any likelihood of future intimidation or harm to the victims.” (*Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 951.)

The record in this case does not establish the requisite good cause. There is no basis for a good cause belief that Salazar attempted, either during or after his vandalism of Honzell’s car, to intimidate or dissuade Honzell from reporting Salazar’s crime or testifying against him. Accordingly, the section 136.2 order is unauthorized and must be stricken. (*Babalola v. Superior Court, supra*, 192 Cal.App.4th at p. 951; *People v. Ponce* (2009) 173 Cal.App.4th 378, 384.)

The People’s arguments to the contrary are unavailing. Salazar’s prior criminal record and his threats

⁴ The trial court docket indicates that the section 136.2 order was filed and served on Salazar the day after he was sentenced. The order, however, is not included in the record on appeal.

against the officers who arrested him do not support a finding of good cause under section 136.2 as to Honzell. Moreover, the trial court's broad discretion to impose reasonable conditions of probation (§ 1203.1) is not undermined here because the section 136.2 order is cumulative of condition 24, which requires Salazar to have no direct or indirect contact with Honzell. Although the prosecutor wanted a separate order under section 136.2, he did not make an offer of proof or offer argument to justify such an order. "[A] prosecutor's wish to have such an order, without more, is not an adequate showing to justify the trial court's action." (*People v. Ponce*, *supra*, 173 Cal.App.4th at pp. 384-385.)

Mobile Electronic Device Search Condition

For the first time on appeal, Salazar contends the trial court erred in imposing as a condition of his mandatory supervision that he "[s]ubmit to search of any mobile electronic device used to store or transmit digital information under your control, at any time, with or without probabl[e] cause[.]" He claims the condition is unlawful pursuant to *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and is also unconstitutionally overbroad.

Salazar's *Lent* claim is forfeited because it was not raised below. (*People v. Moran* (2016) 1 Cal.5th 398, 404, fn. 7.) Anticipating forfeiture, Salazar asserts that his attorney's failure to preserve the claim amounts to ineffective assistance of counsel. To prevail on such a claim, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness, and, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*).) If a defendant fails to establish

either component, the ineffective assistance claim fails and we need not address the other component. (*Id.* at p. 697.)

In reviewing claims of ineffective assistance, we accord great deference to trial counsel's reasonable tactical decisions and reverse "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." [Citations.]” (*People v. Frye* (1998) 18 Cal.4th 894, 980, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) “An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.” (*People v. Kelly* (1992) 1 Cal.4th 495, 540.)

Here, the record does not affirmatively disclose that counsel had no rational tactical purpose for declining to object to the mobile electronics search condition. It is conceivable, for example, that defense counsel made a tactical choice not to object in order to encourage the court to place Salazar on mandatory supervision.

Moreover, Salazar fails to demonstrate he would have achieved a more favorable result had counsel raised a *Lent* objection. Pursuant to *Lent*, a probation condition⁵ is invalid if it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal,

⁵ Although conditions of mandatory supervision have been analyzed under the standards analogous to conditions of parole rather than probation, the standard for analyzing the validity and reasonableness of parole conditions is “the same standard as that developed for probation conditions.” (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.) Accordingly, the standards that apply to conditions of probation, including the *Lent* test, also apply to conditions of mandatory supervision. (*Ibid.*)

and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” (*Lent, supra*, 15 Cal.3d at p. 486.) Salazar claims that the mobile electronics search condition has no relation to the crime of vandalism. But Salazar was also placed on mandatory supervision for forgery. And although Salazar complains that “the record contains no evidence that [he] used his cell phone to commit” forgery, it is possible that counsel did not object to this condition below because such evidence could have been presented by the People if he had objected to this condition below. His claim of ineffective assistance thus fails. (*Strickland, supra*, 466 U.S. at pp. 687, 694.)

Salazar’s overbreadth claim is also forfeited to the extent he claims the challenged condition is overbroad as applied to him. (*In re Sheena K.* (2007) 40 Cal.4th 875, 881 (*Sheena K.*)). Although he correctly notes that *facial* overbreadth challenges that present pure questions of law are not subject to forfeiture (*id.* at pp. 887-889), he fails to establish such a claim here.

“[A] facial overbreadth challenge is difficult to sustain.” (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577.) Such a challenge “is an assertion that the [probation condition] is invalid in all respects and cannot have any valid application [citation], or a claim that the [probation condition] sweeps in a substantial amount of constitutionally protected conduct.” (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109, italics omitted.) “A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K., supra*, 40 Cal.4th at p. 890.) We review constitutional challenges to probation

conditions de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

Salazar contends the mobile electronics search condition is facially overbroad in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. *Riley v. California* (2014) 573 U.S. 373, which he cites in support of his claim, is inapposite. In *Riley*, the court held that law enforcement “must generally secure a warrant” before searching a cell phone. (*Id.* at p. 386.) The court rejected the argument that the search of a suspect’s cell phone was “materially indistinguishable” from the search of an arrestee or an item such as an arrestee’s wallet. (*Id.* at p. 393.) The court explained that “[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.” (*Ibid.*) The court made clear, however, that “[o]ur holding . . . is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.” (*Id.* at p. 401.)

Riley is inapposite in the context of a facial overbreadth challenge to an electronic search probation condition. “When the *Riley* defendant’s cell phone was searched, he had not been convicted of any crime and thus he was still protected by the presumption of innocence.” (*People v. Guzman* (2018) 23 Cal.App.5th 53, 64.) No such presumption applied here. In addition, *Riley* did not consider the constitutionality of probation conditions, and the balancing of the state’s interests and the defendant’s privacy interests regarding probation conditions is markedly different. (See *id.* at pp. 64-65.) Moreover, “the fact that a search of an electronic device may

uncover comparatively more private information than the search of a person, or a personal item like a wallet, does not establish that a warrantless electronic search condition of probation is per se unconstitutional.” (*Id.* at p. 65.) Salazar’s facial overbreadth challenge thus fails.

Alcohol and Drug-related Conditions

Salazar also challenges conditions of his mandatory supervision barring him from (1) using or possessing alcohol or frequenting places where the sale of alcohol is the principal business (condition 17), and (2) using or possessing drug paraphernalia (condition 14). He contends “[t]hese conditions are unconstitutionally vague because they fail to give [him] fair warning of what conduct to avoid.”

Although Salazar did not object to these conditions below, his claims of facial vagueness present pure questions of law and are thus cognizable on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) On the merits, however, the claims fail.

“A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.]” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) A condition is invalid if it is ““so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’ [Citation.]” [Citation.]” [Citation.]” (*People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1128.) We review claims of facial vagueness de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

Salazar asserts that condition 17 is unconstitutionally vague because (1) it “fails to state whether

possession means only actual possession or includes constructive possession too”; and (2) “the condition barring [him] from certain establishments does not on its face make clear what constitutes an establishment where the sale of alcohol is [the] principal business.” He claims that condition 14 is also vague because it “fails to state what constitutes drug paraphernalia.”

We conclude that the challenged conditions are sufficiently precise to pass constitutional muster. “When interpreting a probation condition, we rely on “context and common sense”’ [Citation.] Probation conditions must be ‘given “the meaning[s] that would appear to a reasonable, objective reader”’ [citation], and interpreted in context and with the use of common sense [citation]. A probation condition ‘should not be invalidated as unconstitutionally vague ““if any reasonable and practical construction can be given to its language””’ or if its terms may be made reasonably certain by reference to ““other definable sources.”’ [Citation.]” (*People v. Rhinehart* (2018) 20 Cal.App.5th 1123, 1129.)

When viewed in context and with common sense, condition 17 sufficiently conveys to Salazar that he cannot knowingly and personally possess alcohol or frequent places, such as bars, where the sale of alcohol is the principal business. (See *People v. Hall* (2017) 2 Cal.5th 494, 497-498 [recognizing that probation conditions barring the possession of illegal drugs include an implicit requirement of knowing possession].) At sentencing, the court made clear that Salazar was not to “be in places where the sale of alcohol is the primary business, that includes bars.” Contrary to Salazar’s claim, a reasonable and objective reader would not construe this condition to apply to “a

bowling alley, pool hall, . . . football stadium,” “convenience stores,” or “bar-and-restaurant facilities.”

Condition 14 also makes sufficiently clear that Salazar shall not knowingly possess drug paraphernalia, which is statutorily defined as “all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.” (Health & Saf. Code, § 11014.5, subd. (a).) Although Salazar correctly notes that many common household items can be used as drug paraphernalia, common sense dictates that he could not be found to have violated condition 14 unless he knowingly and willfully possessed such an item for such use. (*People v. Hall*, *supra*, 2 Cal.5th at pp. 497-498.)

DISPOSITION

The stay-away order issued pursuant to Penal Code section 136.2 is stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

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